NO. 21215

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED R. MORALES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

The appellant, Fred R. Morales, was indicted on February 26, 1964, by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This indictment charged appellant in three counts for violations of Section 174, Title 21, United States Code. Count One charged him, in substance, with the unlawful concealment and facilitation of concealment of 6 grams, 610 milligrams of heroin which, as the defendant then and there well knew, had been

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1/ C. T. 2, "C. T." refers to Clerk's Transcript of Proceedings.

imported into the United States contrary to law. Count Two charged that he unlawfully concealed and facilitated the concealment of 141 grams, 770 milligrams of heroin, while Count Three charged he unlawfully concealed and facilitated the concealment of 96 grams, 905 milligrams of heroin. The indictment charged that all three offenses took place on February 6, 1964 [C. T. 2, 3, 4].

In all counts it was alleged that Patricia Ann Morales was a codefendant. However, on April 20, 1964, following a hearing, a motion to suppress evidence was granted as to codefendant Patricia Ann Morales, but denied as to appellant. On April 27, 1964, the indictment as to Patricia Ann Morales was dismissed on motion of the Government.

On April 28, 1964, the first jury trial in this case commenced, and appellant was found guilty on April 29, 1964. On May 25, 1964, appellant was sentenced to six years on each of the counts, said sentences to run concurrently. An appeal was taken from that judgment, and the case was reversed and remanded on May 1, 1965, by the United States Court of Appeals, Ninth Circuit. Morales v. United States, 344 F. 2d 846 (9 Cir. 1965).

On August 30, 1965, before the Honorable Roger D. Foley, United States District Judge, jury trial again commenced, and appellant, on August 31, 1965, was again found guilty as charged [C. T. 32, 33, 34].

On January 31, 1966, appellant was sentenced by Judge Foley, to imprisonment of seven years on each count, the

sentences to run concurrently [C. T. 35].

Notice of appeal was filed in a timely manner, on February 2, 1966 [C. T. 37, 38], and permission to proceed in forma pauperis was granted on February 2, 1966 [C. T. 39].

The District Court had jurisdiction of the case under Title 28, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, United States Code.

II

STATUTES INVOLVED

Each count in the indictment was based upon Title 21, United States Code, Section 174, which provides in pertinent part as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than

five or more than twenty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

On August 6, 1964, Deputy Sheriffs from the Orange County Sheriff's Office and the Los Angeles County Sheriff's Office went to appellant's home, at 10228 Regatta Street, in Whittier, California, where they arrested appellant's wife, pursuant to some warrants. 2/ Appellant was present in the house at the time of his wife's arrest [R. T. 50].

Incident to this arrest, a search of the house was conducted. A man's suit coat was found hanging in the bedroom closet [R. T. 38]. The outer breast pocket of the suit coat contained a handkerchief in which was wrapped, what was later determined to be, 6.610 grams of heroin [R. T. 38, 31]. In the outer left coat pocket three rubber containers were found which proved to contain 141.770

2/ R. T. 35, 36. "R. T." refers to Reporter's Stenographic Transcript.

grams of heroin [R. T. 38, 31]. And in the inside breast pocket of this coat a rolled up newspaper was discovered which held 96.905 grams of heroin [R. T. 38, 39, 31, 32].

Appellant came into the bedroom and was asked to whom the man's suit coat and heroin belonged. Appellant answered that it was his [R. T. 47, 52].

At the time he made this admission, appellant was under arrest and, to a certain degree, under the influence of a narcotic [R. T. 54], but was not in a high state of intoxication [R. T. 57]. He was not "drunk" from the narcotics [R. T. 60]. Rather, he was only "slightly under the influence of a narcotic" [R. T. 61].

There was no testimony offered, requested, or objected to, as to whether or not the appellant had been advised of any constitutional rights prior to admitting that the man's suit coat hanging in his bedroom closet was his own.

IV

ARGUMENT

A. APPELLANT HAS PRESENTED NO "EXCEPTIONAL CIRCUMSTANCES" WHICH WOULD ALLOW HIM TO RAISE QUESTION OF DENIAL OF FIFTH AND SIXTH AMENDMENT RIGHTS FOR THE FIRST TIME ON APPEAL.

Appellant's brief repeatedly contends that appellant was not warned of his constitutional rights prior to admitting, at his home,

that the coat which was hanging in the bedroom closet was indeed his own. An examination of the Reporter's Transcript, however, discloses no testimony, one way or the other, regarding what constitutional warnings had been given the appellant at the time of his arrest. This issue was never raised before the trial court.

As the Ninth Circuit has stated, in Moore v. United States, 161 F. 2d 932, 933, cert. denied, 67 S. Ct. 1746, 331 U. S. 857, 91 L. Ed. 1864:

> " . . . It may not be doubted that while normally a defendant may not claim a reversal except for error duly saved and assigned, this court has the power to reverse, notwithstanding no objection was made and no exception taken, when justice requires (citations). But this does not mean the appellate court will retry the case as a jury would . . . when a defendant is convicted, as appellant here was, on a fair charge and on a trial containing no objections or exceptions to its course and conduct, only the strongest kind of showing that justice has miscarried will avail him." (Emphasis added).

The Government contends that no such "strongest kind of showing that justice has miscarried" has been made by appellant.

The Government first wishes to point out that the case of Miranda v. Arizona, 384 U. S. 436 (1964), has no application to this appeal. Only Escobedo v. Illinois, 378 U. S. 478 (1964) could

be applicable, since appellant's trial took place on August 30 and 31, 1965. Johnson v. New Jersey, 384 U.S. 719 (1966).

Appellee next cites Williams v. United States, 358 F.2d 325 (9 Cir. 1966) as being squarely on point. In that case, the appellant raised the following specification of errors:

1. Appellant was not advised of his right to remain silent, nor of his right to have counsel at all stages of the proceedings.

2. Statements and admissions of the appellant made at the time of arrest were used against him at his trial without laying a proper foundation.

In ruling on those two points, this Court stated, at page 329:

> "We find no error. The record does not support the claims of appellant that he was in any way denied the assistance of counsel or that he was not warned of his constitutional rights. No opportunity was given to the trial court to inquire into the claims now asserted by appellant. The appellant elected not to testify in the proceedings and offered no testimony tending to show a denial of constitutional rights. The claimed errors are not properly before this Court and we find no good cause why these errors should be reviewed for the first time on appeal. (citations)"

This same issue was similarly decided in Benjamin Franklin Boland v. United States, ___ F.2d ___ (9 Cir. No. 19,928, decided August 12, 1966).

Likewise, in the case of Dearinger v. United States, 344 F. 2d 313 (9 Cir. 1965), this Court noted, at page 313:

> ". . . (Appellant) asserts that he was not represented by counsel during a period between arrest and trial, and that there was unauthorized communication between a third person and certain jurors during trial. Neither contention was made to the trial court, and both rest upon assertions of fact wholly outside the record. They present nothing which we can review in this proceeding. (citations)"

In connection with the instant case the Government wishes to point out the following factors. The case of Escobedo v. Illinois, 378 U. S. 478, was decided on June 22, 1964. Appellant Morales was first tried and convicted, on April 28 and 29, 1964. Thereafter he appealed and the case was reversed on May 1, 1965. The Court specifically noted, at page 849, that:

> "Morales has been ably defended by court appointed counsel, both here and in the court below."
>
> Morales v. United States, 344 F. 2d 846 (9 Cir. 1965).

The same attorney who represented Morales at the first trial and on the first appeal, represented appellant at the re-trial. This re-trial took place on August 30 and 31 of 1965 [C. T. 32-33], over a full year after the decision in Escobedo v. Illinois, supra. There were no questions or objections made, whatsoever, during the

course of the re-trial, regarding what constitutional warnings had been given the defendant prior to his making of the statement in his home that the coat hanging in his bedroom closet was his own.

Furthermore, on both occasions when counsel moved to strike that admission, he specifically limited the grounds to the contention that appellant was under the influence of a narcotic drug [R. T. 61, 80].

The Government submits that the instant case presents no more "exceptional circumstances" requiring review of this question than did the Williams and Toland cases cited above.

B. A PRELIMINARY DETERMINATION OF VOLUNTARINESS OUTSIDE OF THE JURY'S KNOWLEDGE WAS MADE IN CASE.

The assertions now raised on appeal that appellant was so narcotized at the time of his arrest as to render his statements inadmissible were heard and decided at appellant's first trial. The record went before the Ninth Circuit, and this Court, speaking through Judge Ely, stated:

> "The receiving into evidence of the admissions made by Morales immediately before and after his arrest is challenged upon the assertion that since Morales was under the influence of narcotics, it necessarily follows that his faculties were impaired to an extent such as to compel a conclusion that the

admissions were made involuntarily. The record does not support the factual premise upon which the point is based. While there was evidence, as stated above, that Morales appeared to be 'slightly under the influence of narcotics,' there was also evidence that during the time that the conversations at the place of arrest, the speech of Morales was not impaired and that he answered questions in such a manner as to negate the then existence of drug induced mental disability. In this state of the record, there is no justification for disturbing the determination of the trial judge as to the propriety of receiving the incriminating admissions into evidence. (citations)" (Emphasis added).

Morales v. United States, 344 F. 2d 846 (9 Cir. 1965).

he case was reversed upon other grounds involving a different onfession, however, and upon re-trial, appellant renewed his otion to suppress. The following colloquy was had between the ourt and defense counsel:

"THE COURT: Well, the Court of Appeals ruled against you, didn't they?

"MR. VISICK: That is correct. Well, the Court of Appeals, in the opinion, said that the evidence was properly admitted by the trial court, but did not base its opinion upon that point. The opinion merely

is based on the point that a confession was admitted which should not have been admitted and reversed. So, it seems to me, that any other statements are really dicta since any other point which would have required reversal was decided.

"THE COURT: Well, I am going to deny your motion at this time. You may renew it at the time the evidence is offered. But, to the extent that the Court of Appeals, I thought, with great care detailed the history of the evidence and specifically rejected appellant contention, I think the law of the case is certainly established." (Emphasis added). [R. T. 25].

The Government submits that the issue of the effect of the narcotics upon the defendant was resolved thrice in favor of voluntariness, and incorporated by the above reference into the re-trial. It was decided once by Judge Yankwich at the first trial, and then by the jury there, and, finally, upon review in this Court. That all parties understood it to have been so determined is further indicated by the fact that even though the re-trial took place over a full year subsequent to the opinion in Jackson v. Denno, 378 U. S. 368 (decided June 22, 1964), there never was any request either by the defense counsel, by the Government, or by the court, for another hearing on the question of voluntariness outside of the jury's presence. And there was never an offer by appellant to produce new evidence not heard at the first trial.

Here, there had been an independent determination of voluntariness made "prior to the admission of the confession to the jury which (was) adjudicating guilt or innocence". Clearly the requirements of Jackson v. Denno, supra, were satisfied.

Appellant's contention that allowing the jury to further decide the question of voluntariness would require reversal is without merit. Once, as here, an independent determination of voluntariness is made in the absence of the jury, final appraisal of the confession may be left with the jury. This course -- sometimes called the "Massachusetts doctrine" -- was approved in Jackson v. Denno, and has the benefit of avoiding "grave questions of Constitutional law, such as whether the entitlement to a jury trial does not compel jury determination of the validity of a confession". United States v. Inman, 352 F. 2d 954, 956 (4 Cir. 1965).

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.